

EXHIBIT C

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 CONSTRUTORA NORBERTO ODEBRECHT S.A.,

5 Plaintiff,

6 v.

07 CV 8014 (CM)

7 GENERAL ELECTRIC COMPANY, et al.,

8 Defendants.
9 -----x

10 New York, N.Y.
11 September 12, 2007
12 10:35 a.m.

13 Before:

14 HON. COLLEEN McMAHON

15 District Judge

16 APPEARANCES

17 BOIES, SCHILLER & FLEXNER LLP

18 Attorneys for Plaintiff

19 BY: HOWARD L. VICKERY

20 AMY L. NEWHARDT

21 CHRISTOPHER A. WIMMER

22 WEIL, GOTSHAL & MANGES LLP

23 Attorneys for Defendants

24 BY: RICHARD A. ROTHMAN

25 VERNON BRODERICK

KEVIN F. MEADE

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1 THE COURT: First of all, I apologize for my voice.
2 Whatever it was that brought me down has finally felled me. I
3 woke up at 3 in the morning with a very, very sore throat and a
4 lot of congestion so I will try to use this microphone.

5 Second, yesterday was the eve of an important holiday
6 so, of course, I expected an order to show cause to arrive and
7 it did. But as my law clerks were gone for the holiday, I read
8 every word of your papers myself, Mr. Vickery, including your
9 exhibits. So I don't think that I need to hear from you. I
10 think I need to hear from Mr. Rothman.

11 MR. ROTHMAN: Should I use the podium or would you
12 prefer here?

13 THE COURT: I actually prefer that you use the podium.
14 The mike situation is better.

15 MR. ROTHMAN: Thank you, your Honor.

16 I received a call in this matter last night sometime
17 around 9 o'clock.

18 THE COURT: 9? That late?

19 I sent them out to tell you at 4. I said it was no
20 secret where General Electric was.

21 MR. ROTHMAN: They may have contacted somebody at GE.
22 I received a call sometime around 9 o'clock.

23 We are very new to this matter. My knowledge of the
24 facts are, obviously, sketchy. We have not spoken to
25 witnesses, but I can say that we have read their papers. And

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1 based on their papers alone, I think it is clear that the TRO
2 should be denied. In the first instance, it is difficult to
3 understand how they believe they could come into a New York
4 court and seek a TRO.

5 THE COURT: Are you suggesting that I don't have
6 jurisdiction? Obviously, the issue has popped out at me
7 because I have read the papers.

8 MR. ROTHMAN: Yes. There is an exclusive forum
9 selection clause.

10 THE COURT: In the contract between the Brazilian
11 joint venture and the plaintiff?

12 MR. ROTHMAN: In the non-disclosure agreement and the
13 other agreement, the memorandum of meeting, I believe it is
14 called, the MOM, is specifically subject to the confidentiality
15 agreement. That forum selection clause required them to bring
16 any claims in Brazil, which was their own court, regarding a
17 major project with government involvement that is ongoing in
18 Brazil. I think, your Honor, one has to ask the question that
19 popped out at you and popped out at us: Why would a Brazilian
20 plaintiff with a contract governed by Brazilian law with a
21 Brazilian forum selection clause come running to the New York
22 court?

23 THE COURT: Probably because they hired Mr. Vickery.

24 MR. ROTHMAN: I don't think so.

25 THE COURT: Although he could have gone to Connecticut

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1 or Schenectady.

2 MR. ROTHMAN: Absolutely.

3 The only apparent answer that occurs to us or our
4 client is that this is an attempt to do an end-run around a
5 major investigation that is going on in Brazil which is being
6 conducted by the SDE, the Brazilian antitrust authorities. And
7 the SDE is in the process of investigating not just this
8 contract but other contracts which Odebrecht apparently entered
9 into containing non-competes with other suppliers and potential
10 competitors for this project. That investigation, which is
11 referenced in veiled terms but never explained to the court in
12 the papers, is not only ongoing but I understand that a ruling
13 is expected shortly. That investigation may well result in a
14 determination that the very contracts that they seek to enforce
15 here are invalid.

16 And so as we try to understand why they are here,
17 rather than going to their own home court and honoring the
18 forum selection clause, it looks to us like there is a danger
19 that they are trying to lure this Court into setting up a
20 situation where there is an order of a New York court
21 respecting the enforceability of the very contracts that the
22 Brazilian government and the SDE in particular are
23 investigating.

24 In any event, I will come back to the forum selection
25 clause. We believe that the Court does not have jurisdiction,

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1 that they have clearly violated the forum selection clause and
2 that, in addition, over and above that, the case should be
3 dismissed on forum non conveniens grounds for obvious reasons,
4 in any event.

5 With respect to the agreements, they also have not
6 brought to the Court's attention that the non-disclosure
7 agreement contains a liquidated damages clause which clearly
8 gives them an adequate remedy of law. It contains no provision
9 for injunctive relief.

10 THE COURT: That is the non-disclosure agreement. How
11 about the January 11 agreement?

12 MR. ROTHMAN: Again, your Honor, if you look at the
13 M-O-M agreement, it does not --

14 THE COURT: We will call it the MOM.

15 MR. ROTHMAN: All right. We will call it the MOM.

16 The MOM does not contain either a provision for
17 injunctive relief or a liquidated damages clause.

18 THE COURT: I didn't remember one.

19 MR. ROTHMAN: But it says in paragraph 5A, if you have
20 the MOM --

21 THE COURT: With lots of notes.

22 MR. ROTHMAN: -- if you look at paragraph 5A of the
23 MOM it says expressly, the MOM is subject to a confidentiality
24 agreement signed by the parties and currently in force. If GE
25 does not enter the construction consortium or exit the

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1 construction consortium under any provision of this MOM, then
2 GE shall maintain a confidentiality agreement until its expiry
3 and further agrees not to pursue this project with any other
4 party. So the confidentiality agreement contained a liquidated
5 damages clause and the MOM was expressly subject to its terms.

6 THE COURT: I am not quite sure what that means.

7 MR. ROTHMAN: What it means is that these two
8 agreements -- let me step back, your Honor. I want to touch on
9 one introductory point, and then if I could delve into forum
10 selection clause and the agreements.

11 One thing that is important to note here is that GE
12 has no intention of doing anything other than honoring the
13 terms of the non-compete, the exclusivity agreement, provided
14 that the SDE doesn't invalidate it. Indeed, if you look at the
15 exhibits that they have presented to the Court, they are
16 consistent with that, that GE has said to them and to the SDE
17 that it will honor the exclusivity provisions. To the extent
18 that the SDE invalidates them, GE will make a business decision
19 as to what to do. It has made no decision now.

20 But under those circumstances and, again, their
21 exhibits show there is no risk of violation of the exclusivity
22 with which they are threatened. There is no urgency. Nothing
23 is going to happen for weeks. They have an adequate remedy as
24 well and they have no business being in this court.

25 As I will now go through in a little more detail,

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1 looking at nothing but their papers, we don't think that they
2 have any basis for a TRO under any aspect of the governing
3 test.

4 Turning to the non-disclosure agreement, as you have
5 seen, your Honor, it provides explicitly in paragraph 19 that
6 this agreement is construed under and governed by Brazilian
7 law. The parties elected the central court of the city of Sao
8 Paulo as having jurisdiction to resolve any dispute arising
9 from the agreement, to the exclusion of any other, no matter
10 how privileged.

11 So what do they say about it?

12 They have put in an affidavit of a Brazilian lawyer
13 and he has said, first, that this is a -- I think he said it
14 was a preliminary or a temporary agreement that was meant to be
15 in place only until the MOM was signed.

16 Well, that is utterly baseless, your Honor, because if
17 you look at the confidentiality agreement, and it sounds like
18 you read it carefully, paragraph 8 says, and I quote: "The
19 confidentiality established in this agreement shall remain in
20 effect for six years beginning on the signature date hereof."

21 THE COURT: That sounds temporary, six years, in the
22 great scheme of things.

23 MR. ROTHMAN: In the great scheme of things, I now
24 come back --

25 THE COURT: I know what you are saying and you are

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1 absolutely right. This is not some sort of an interim
2 agreement.

3 MR. ROTHMAN: This was not a letter of intent. It was
4 a signed agreement with a six-year term.

5 THE COURT: Among three Brazilian corporations.

6 MR. ROTHMAN: If you look at anything, it was the MOM
7 that was the temporary agreement because, for instance now,
8 directing your attention to paragraph 1 of the MOM, it says in
9 the second paragraph: "Due to the size, complexity and
10 dynamics of the project, it is understood that this agreement
11 does not entirely cover or include all pertinent contract
12 elements."

13 THE COURT: I wonder if that meant that you were going
14 to argue that it was not a contract.

15 MR. ROTHMAN: I have not studied it long enough to
16 take a position one way or another, but what I do know is that,
17 in other places in the agreement, it makes clear again in 5A
18 that it was subject to the confidentiality agreement. And even
19 if this agreement expired, the confidentiality agreement
20 survived.

21 Then what is the next thing that the Brazilian lawyer
22 says?

23 First of all, there is not a single cite to a
24 Brazilian statute to support what he is saying. But even more
25 substantively, I think it is clear from the face of his

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1 affidavit and the Pinto affidavit that they lose on their
2 papers because what has he said? He says that the Brazilian
3 courts would enforce the non-disclosure confidentiality clause
4 with respect to claims arising from the agreement.

5 They then try to argue these two agreements are
6 entirely distinct, and we are not really complaining about the
7 violations of the confidentiality agreement. But, your Honor,
8 I would submit to you that that is totally baseless.

9 And if I could approach, one of the things that we did
10 last night in the little bit of time that we had was to go
11 through their papers and just pull out the quotes from their
12 affidavits and their briefs which make crystal clear that the
13 gravamen of their claim is that they are threatened with a
14 breach or there has been an alleged breach of the
15 confidentiality agreement.

16 So, for instance, just take a look at the first one
17 of -- and I am not going to read them all -- their brief says
18 at page 3: "Not only would General Electric bring its
19 technical resources and expertise to the consortium, it would
20 also inevitably make use (if it has not done so already) of the
21 highly confidential and proprietary information developed by
22 CNO at great effort and expense, including information that is
23 crucial to the turbine design, the technical centerpiece of the
24 entire project."

25 They then say at page 18 -- and I am just picking at

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1 random now -- "General Electric, however, is privy to the very
2 information that makes CNO's plans far superior to those of any
3 company. Thus, were General Electric to directly or indirectly
4 assist a competitor of CNO, CNO's hard earned advantages could
5 be lost."

6 I will just look at one more. If you look at the
7 Pinto affidavit, and we will take a look at 2, page 27, and
8 that's on page 3 of our excerpt: "CNO further explained that
9 because of the nature of the project, the exclusivity and
10 confidentiality provisions are dependent on each other, and
11 that it would not be possible for General Electric to
12 participate in a competing bid for the Rio Madeira project
13 without directly or indirectly using information covered by the
14 confidentiality agreement."

15 Finally, Mr. Pinto says at page 29, "Given the limited
16 time available before the auction date to potential bidders who
17 only began developing a bid in the last year, the most
18 important thing that General Electric can bring to a competing
19 group is not its technical ability to manufacture turbines -- a
20 niche that can be filled by any number of entities throughout
21 the world -- but its knowledge of confidential and proprietary
22 information regarding CNO's design and bid."

23 So I don't know how they can stand here with a
24 straight face and represent to a Court that their claims are
25 not claims that arise from the confidentiality agreement or

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1 that these agreements are separate and distinct.

2 THE COURT: One of the things that occurred to me that
3 subject to amend was that it could have made the parties to the
4 January 11th agreement, the MOM, parties to the confidentiality
5 agreement which they originally weren't, although I am not sure
6 exactly which General Electric parties are parties to the MOM.
7 I think it is GE Brazil and somebody up in Schenectady, but I
8 am not sure. But another thing that had occurred to me that
9 subject to amend was that the MOM incorporated by reference the
10 terms of the confidentiality agreement rather than setting them
11 out. But I don't know what a Brazilian lawyer would tell me.
12 Certainly, the Brazilian lawyer who gave the affidavit here
13 kind of danced around that issue. If I had a Brazilian lawyer
14 here I would be asking him some very specific questions about
15 court interpretations of the subject too under Brazilian law.

16 MR. ROTHMAN: Had they sued in Brazil as they agreed
17 to do, we wouldn't have a battle over it, they would simply be
18 going to a Brazilian court over a rudimentary question. This
19 MOM, as I said, doesn't really implicitly incorporate the
20 confidentiality agreement; it does so expressly.

21 So even under his interpretation they are bound by
22 that confidentiality agreement. They were required to bring
23 those claims in Brazil. I think that it is difficult to
24 envision a more flagrant violation even under their
25 interpretation of the forum selection clause which New York

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1 courts, federal courts strictly enforce.

2 THE COURT: Except when they don't. There is that
3 whole line of cases starting with Judge Friendly's case where
4 we don't. I can't remember the name of Judge Friendly's case.

5 MR. ROTHMAN: I think there is a pretty good stream of
6 cases that says, where you have two sophisticated parties
7 entering into an exclusive forum selection clause, absent good
8 reason, the courts will respect it. And here -- and I am going
9 to come to forum non conveniens in a moment -- this isn't a
10 case where two Yugoslavian parties picked New Jersey for no
11 good reason. They are a major Brazilian company, as I said,
12 involved in a major government project in Brazil. It was a
13 perfectly logical and understandable forum for the parties to
14 select. They did so for a very good reason.

15 Now, I mentioned the SDE investigation.

16 THE COURT: I have a lot of questions about that.

17 MR. ROTHMAN: This is my understanding of the
18 investigation. As I say, this is what I have learned since 9
19 o'clock last night. My understanding is that they entered into
20 similar agreements.

21 THE COURT: "They" being the plaintiff?

22 MR. ROTHMAN: They being the plaintiff, with various
23 suppliers who were potential competitors for this project, and
24 that there is an investigation underway by the SDE which is the
25 Brazilian antitrust authorities and which will determine or

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1 which could determine that these contracts, that this contract,
2 among others, is anti-competitive and invalid.

3 I don't know more than that, but what it does reflect
4 is that this is a matter in which the Brazilian government not
5 only has a paramount interest by virtue of the nature of the
6 project, but because there is an ongoing investigation. And
7 they knew that when they decided to ignore the forum selection
8 clause and when they decided to come into this court seeking an
9 extraordinary remedy, that being a TRO.

10 As I said, we don't see any legitimate reason why they
11 came in here other than to do an end-run around that
12 investigation and to put this Court in a position where it
13 potentially is in conflict with the presiding antitrust agency
14 of the Brazilian government.

15 Turning now to the elements that they have to prove to
16 get a TRO, and I know your Honor is familiar with them, first,
17 we believe it is clear that they have an adequate remedy at law
18 by virtue of the liquidated damages clause which is paragraph
19 18 of the non-disclosure agreement. And it says breach of the
20 non-disclosure obligations established herein shall result in a
21 compensatory fine of, I believe it is 20 million reas -- which
22 is the Brazilian unit of currency -- to be paid by the party in
23 violation to the other party.

24 Your Honor, I think it is one of the most
25 well-established tenets of law of injunctions that where you

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1 have a claim for monetary damages -- and here it is a
2 liquidated damages clause -- you have no irreparable harm.

3 Our client's position is that they have not violated
4 the non-disclosure agreement. But if the plaintiffs want to
5 challenge that, they have an adequate remedy at law and they
6 have to seek it, we believe, in Brazil.

7 Second, they have no risk of irreparable harm because,
8 as we have told the SDE and as their exhibits reflect, we have
9 no intention of bidding for so long as this contract is in
10 place. Unless and until the SDE were to invalidate it, it is
11 GE's position and its intention -- and it has made that
12 clear -- that it will continue to honor the exclusivity
13 provision. As I said, their exhibits show that.

14 If you look, for instance, at the letter from ISEA
15 which seems to be the single thread upon which this motion
16 hangs from, it is clear, and now looking at their letter --

17 THE COURT: I forgot what exhibit number that is.

18 MR. VICKERY: Exhibit O, your Honor.

19 THE COURT: Thank you.

20 MR. ROTHMAN: Do you have it?

21 THE COURT: I have to say, in 22 years of practicing
22 and judging, this is the first time I have ever seen a letter,
23 a record about a non-compete in which the defendant and the
24 third party whose interests are impacted by the non-compete
25 both acknowledge that the non-compete exists. That's a new one

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1 on me.

2 MR. ROTHMAN: So we have never denied that the
3 non-compete exists. As you can tell from this letter, if you
4 look at the last paragraph on the first page, it says, "As you
5 learned from press reports and the process carried out by the
6 SDE (secretariat of economic law), GE is legally impeded by a
7 non-compete clause in a document signed with Construtora
8 Norberto Odebrecht, which is protected under a non-disclosure
9 agreement. Should GE not be released from this commitment,
10 either through an SDE decision or a release from the
11 Construtora Norberto Odebrecht consortium, it will be difficult
12 for our consortium to participate in the Madeira River bid
13 process, thus causing the free competition desired by the
14 government to be unfeasible."

15 THE COURT: A little lobbying there.

16 MR. ROTHMAN: Yes. A little lobbying to the
17 government, but it is reflecting the fact that, as we have told
18 them, as we have told the SDE, as is undisputed, there is no
19 threat of a violation of the exclusivity clause. Indeed, their
20 only claim, really, is that they will be or allegedly have been
21 injured by a violation of a non-disclosure agreement which
22 takes you right back to the exclusive forum selection clause.

23 So, your Honor, this is essentially their case, this
24 letter. And this letter, if anything, undercuts them because
25 it shows that, with respect to the threat of irreparable harm,